Supreme Court, U.S.
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No. 99-1969

IN THE

Supreme Court of the United States

JACOBO XACUR, FELIPE XACUR, and JOSE MARIA XACUR,

Petitioners,

v.

BANCO NACIONAL DE MEXICO, S.A.; BANCOMER, S.A.; BANCO MEXICANO, S.A.; BANCA SERFIN, S.A.; BANCO BILBAO VIZCAYA – MEXICO, S.A.; CONFIA, S.A.; BANCO INVERLAT, S.A., and CALIFORNIA COMMERCE BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

REAGAN WM. SIMPSON
Counsel of Record
JOHN A. BARRETT
ZACK A. CLEMENT
FULBRIGHT & JAWORSKI, L.L.P.
Attorneys for Respondents
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151

160698

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Respondents identify all of their parent corporations, and Respondents represent that there are no publicly held companies that own 10 percent or more of the Respondents' stock

The parent company of Banco Nacional de Mexico, S.A. ("Banamex") is Grupo Financiero Banamex Accival, S.A. de C.V.

The parent company of Bancomer, S.A. is Grupo Financiero Bancomer, S.A. de C.V.

The parent company of Banco Mexicano, S.A. is Grupo Financiero Santander Mexicano, S.A. de C.V.

The parent company of Banca Serfin, S.A., is Grupo Financiero Serfin Santander Mexicano, S.A. de C.V.

The parent company of Banco Bilbao Vizcaya-Mexico, S.A. is Grupo Financiero BBV - Probursa, S.A. de C.V.

The parent company of Confia, S.A. is Grupo Financiero Citibank, S.A. de C.V.

The parent company of Banco Inverlat, S.A. de C.V. is Grupo Financiero Inverlat, S.A. de C.V. (The Bank of Nova Scotia owns 10 percent of Grupo Financiero Inverlat, S.A. de C.V.)

The parent company of California Commerce Bank, a California bank, is its Mexican parent, Banamex USA Bancorp.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below	1
B. Statement of Facts	2
C. Correction of Misstatements in the Petition	5
Reasons for Denying the Writ	7
I. This Case Involves Only The Application Of Settled Federal Law To Individual Facts.	7
II. There Is No Need For This Court To Review The Bankruptcy Court's Findings, Which Were Properly Affirmed By The District Court And The Court Of Appeals.	8
A. The Debts Are Not Contingent	8
B. The Debts Are Not Subject to Dispute	11

Contents

	Page
C. The Lower Courts Properly Considered the Xacurs' Arguments	13
Conclusion	14
Appendix — Relevant Statutes	1a

TABLE OF CITED AUTHORITIES

Page

Cases:

A.I. Trade Fin. v. Petra Int'l Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) 10

Banco Nacional de Costa Rica v. Bremar Holdings Corp., 492 F. Supp. 364 (S.D.N.Y. 1980) 11

Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Prods., Inc.), 23 F.3d 241 (9th Cir. 1994) 9

Fr. Winkler KG v. Stoller, 839 F.2d 1002 (3rd Cir. 1988) 10

In re All Media Properties, Inc., 5 B.R. 126 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981) 7

In re Xacur, 216 B.R. 187 (Bankr. S.D. Tex. 1997) 2, 3, 4, 8, 12

In re Xacur, No. H-97-3283 (S.D. Tex. Oct. 22, 1998) 7

Rayman v. Peoples Sav. Corp., 735 F. Supp. 842 (N.D. Ill. 1990) 10, 11

Southwest Livestock & Trucking Co. v. Ramon, 169 F.3d 317 (5th Cir. 1999) 12

Cited Authorities

Page

Subway Equip. Leasing Corp. v. Sims (*In re Sims*), 994 F.2d 210 (5th Cir. 1993) 8

Summers v. Guss, 7 F. Supp. 2d 237 (W.D.N.Y. 1998) 2, 3, 11

United States v. Wright, 57 F.3d 561 (7th Cir. 1995) 8, 9

Winters v. George Mason Bank, 94 F.3d 130 (4th Cir. 1996) 8

Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744 (5th Cir. 1981) 12

Statutes:

11 U.S.C. § 303 ..... 2, 4, 7

11 U.S.C. § 303(b)(1) 12

Mexican Civil Code, Article 1989 9

Mexican Commercial Code, Article 1097 10

Mexican Negotiable Instrument Law, Article 114 ... 9

Mexican Negotiable Instrument Law, Article 116 ... 9

Cited Authorities

Page

Rules:

SUP. CT. R. 10 ..... 6, 7, 8

SUP. CT. R. 10(a) 13

SUP CT. R. 15.2 ..... 5, 6

Other Authority:

2 COLLIER ON BANKRUPTCY § 303.03[2][a][I] (Lawrence P. King, ed., 15th ed. rev. 2000) 7

This brief in opposition is being filed jointly by all of the respondents: Banco Nacional de Mexico, S.A.; Bancomer, S.A.; Banco Mexicano, S.A.; Banca Serfin, S.A.; Banco Bilbao Vizcaya – Mexico, S.A.; Confia, S.A.; Banco Inverlat, S.A.; California Commerce Bank ("the Banks"). This brief in opposition responds to the petition for writ of certiorari filed by the petitioners, Jacobo Xacur, Felipe Xacur, and Jose Maria Xacur ("the Xacurs").

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

This proceeding consolidates three petitions for involuntary bankruptcy that the Banks filed against the Xacurs. The Banks filed those petitions because the Xacurs failed to honor guaranties that they executed in Mexico for loans that the Banks made in Mexico to the Xacurs' family-owned, Mexican companies (the "Xacur Companies"). (*See* PX 3-125; XX 2.) The Banks initiated this proceeding in the United States because the Xacurs had transferred their residences to this country and continued to default on their loan guaranties. *See In re Xacur*, 216 B.R. 187, 192-95 (Bankr. S.D. Tex. 1997) (App. D to Pet.[1] at 23a, 27-29a, 32a).[2]

1. "App. D to Pet." refers to item D in the appendix to the Xacurs' petition for writ of certiorari. Other items in the appendix to the petition will be similarly cited. Citations to "Pet." refer to the petition itself. The appendix to this response will be cited "App. to Resp."

2. *Accord* Tr. 5/05/97, at 63-71, 155; PX 134, at No. 1; PX 139, at exhs. 3, 6, 7; PX 140 at Nos. 4, 8, 12, 15; PX 144 at deposition exhs. 1-15; PX 145, at 464-69, 471, 510; PX 146, at exh. 4; PX 150, at deposition exh. 2, at pp. 6-11; PX 162-63; PX 170; PX 225; XX 69, at Tamaya Deposition, at pp. 50-51.

In this Court, the Xacurs challenge the Banks' right to initiate an involuntary bankruptcy proceeding under 11 U.S.C. § 303 (App. E to Pet. at 36a-40a). That challenge was rejected by the bankruptcy court, which refused to dismiss the Banks' petitions. *See In re Xacur*, 216 B.R. 187 (Bankr. S.D. Tex. 1997) (App. D to Pet.) The bankruptcy court's ruling was affirmed by the district court and the court of appeals. (App. A & C to Pet.)

Petitioners do not raise two issues that the parties litigated below. First, the Xacurs do not now challenge the bankruptcy court's exercise of jurisdiction over them. The Xacurs qualify as debtors for purposes of a United States bankruptcy proceeding because each has established a residence in this country. *See In re Xacur*, 216 B.R. at 193-94 (App. D to Pet. at 27a-29a). Second, the Xacurs do not challenge the bankruptcy court's decision that abstention is not required under comity principles. In making its decision, the bankruptcy court noted that no Mexican court has sought to enjoin the bankruptcy proceedings in this country. *See In re Xacur*, 216 B.R. at 196 (App. D to Pet. at 34a).

B. Statement of Facts

This bankruptcy proceeding centers on the Xacurs' loan guarantees, which are called *avals* under Mexican law. (Tr. 5/06/97, at 14; *see also* PX 4-125.) An *aval* is a "customary term used in Latin America to denote an unconditional guarantee" under which the guarantor, or *avalista*,[3] is "obliged to pay the debt obligation as if it were

3. An *avalista* is one who gives an *aval*. *See In re Xacur*, 216 B.R. 187, 189 (Bankr. S.D. Tex. 1997) (App. D to Pet. at 16a). *Avalor* is another term that has the same meaning. *See Summers v. Guss*, 7 F. Supp. 2d 237, 239 n.3 (W.D.N.Y. 1998).

the primary debtor." *Summers v. Guss*, 7 F. Supp. 2d 237, 239 n.3 (W.D.N.Y. 1998); *see In re Xacur*, 216 B.R. at 189 (App. D to Pet. at 16a). The Xacurs' *avals* are exactly that – signatures by the Xacurs as additional makers of the promissory notes (called *pagares* in Mexico) that the Xacur Companies executed in return for over $240 million in loans from the Banks. *See In re Xacur*, 216 B.R. at 189 (App. D to Pet. at 16a).

The Xacur Companies later defaulted on the notes and initiated a suspension-of-payments proceeding in Mexico – the Mexican equivalent to reorganization in bankruptcy. (Tr. 5/05/97, at 31-39, 76-77; PX 134, at Nos. 9, 21; PX 137, at Nos. 8, 20; PX 140, at Nos. 9, 21; PX 159, at 2.) Meanwhile, the individual Xacurs failed to meet their obligations as *avalistas*, and they left Mexico for Texas, where the Banks filed petitions for involuntary bankruptcy against them. (PX 3; PX 4-125; PX 134, at No. 1; PX 139, at exh. 3; PX 144, at deposition exhs. 1-5; PX 170.) The Xacurs then filed motions to dismiss the Banks' petitions, which led to the evidentiary hearing below. *See In re Xacur*, 216 B.R. at 189 (App. D to Pet. at 14a-15a).

At the evidentiary hearing, the Banks presented expert testimony from Lic. Carlos Sanchez-Mejorada y Velasco ("Mejorada"). *See In re Xacur*, 216 B.R. at 194 (App. D to Pet. at 29a). Mejorada received a Mexican law degree in 1964 and an L.L.M. from Harvard Law School. (PX 1.) He has extensive experience in Mexican bankruptcy and commercial law, being the Mexican co-reporter for the American Law Institute's Transnational Insolvency Project and co-author of its Mexican statement of bankruptcy law. (PX 1.) Mejorada gave testimony responding to the Xacurs' argument that their debts do not satisfy two requirements of an involuntary

bankruptcy under section 303 of the Bankruptcy Code. *See* 11 U.S.C. § 303 (1994) (App. E to Pet. at 36a-40a). Specifically, the Xacurs contend that, contrary to the requirements set forth in subdivision (b)(1) of Bankruptcy Code section 303, their debts are: (1) "contingent," and/or (2) subject to the "bona fide dispute" that they are usurious under Texas law. *Id.*

Mejorada testified that the Xacurs' debts are not contingent for any reason, and specifically that they did not become contingent merely because the Xacur Companies filed a suspension-of-payments proceeding. (Tr. 5/06/97, at 61-62-63, 65; *see also* PX 1.) Mejorada further testified that the Xacurs' debts are not subject to any bona fide dispute by virtue of usury laws. (*See* Tr. 05/06/97, at 45; *see also* PX 1.) Mejorada's uncontradicted testimony is that the notes are governed by Mexican law and that they are not usurious under Mexican law. (*See id.*)

The bankruptcy court found Mejorada's testimony to be persuasive on all issues. *See In re Xacur*, 216 BR at 194 (App. to Pet. at 29a-30a). The bankruptcy court rejected the Xacurs' "bona fide dispute" argument for an additional reason. The court found that the bankruptcy proceeding was proper because, for purposes of Bankruptcy Code section 303, a "sufficient" amount of the promissory notes are not usurious under either Texas or Mexican law. *Id.*

C. Correction of Misstatements in the Petition

Following this Court's admonition, the Banks "address any perceived mistatement made in the petition." SUP. CT. Rule 15.2.

The Xacurs refer to themselves as "Mexican nationals." (Pet. at 1.) They omit, however, to state that they moved to the United States and continued to default on their *avals* while residing in this country, before the Banks filed petitions for involuntary bankruptcy. (*See* Tr. 5/05/97, at 63-71, 155; PX 134, at No. 1; PX 139, at exhs. 3, 6, 7; PX 140 at Nos. 4, 8, 12; PX 144 at deposition exhs. 1-5; PX 145, at 464-69, 471, 510; PX 146, at exh. 4; PX 150, at deposition exh. 2, at pp. 6-11; PX 162-63; PX 170; PX 225; XX 69, at Tamaya Deposition, at pp. 50-51.) Also omitted from the petition is any acknowledgment that the Xacurs have completely defaulted on their loan guaranties. (*See* Tr. 5/05/97, at 36; PX 3; XX 2.)

The Xacurs are incorrect in asserting that any of the Banks have admitted the validity of any claim of usury. (*See* Pet. at 5, 14-15.) The Xacurs further err in claiming that the Banks allege the applicability of Texas law to the transactions and debts in question. (*See* Pet. at 13.) Instead, Mexican law governs the transactions, as the Banks have consistently maintained. *See* Appellees' Br. at 29-31.

The Xacurs erroneously claim in their petition that one Mexican district court has ordered the accumulation of the "individual lawsuits against the avalistas" to the Xacur Companies' suspension-of-payments proceeding. (*See* Pet. at 9 (emphases added).) In fact, however, that order pertained only to one suit by one of the Banks against only

bankruptcy under section 303 of the Bankruptcy Code. *See* 11 U.S.C. § 303 (1994) (App. E to Pet. at 36a-40a). Specifically, the Xacurs contend that, contrary to the requirements set forth in subdivision (b)(1) of Bankruptcy Code section 303, their debts are: (1) "contingent," and/or (2) subject to the "bona fide dispute" that they are usurious under Texas law. *Id.*

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one of the petitioners (*see* XX 36), as will be explained further below.[4]

Another erroneous claim in the Xacurs' petition is that the "Juez Concursal" (*i.e.*, the Mexican bankruptcy court) "has requested that all the civil actions involving the Xacur Companies and the Xacurs be incorporated into the Suspension of Payment Proceedings." Pet. at 7. Indeed, the Mexican bankruptcy court has indicated just the opposite in its only ruling on any of the *avals* in question – namely, its decision not to hear a suit on Felipe Xacur's *aval* on the ground that his *aval* is not part of the Xacur Companies' suspension-of-payments proceeding. (*See* PX 228.)

The Xacurs misquote the testimony of the Banks' expert witness, Mejorada, when they appear to attribute to him an admission about the supposed common "destiny" of the primary debtor and the *avalista*. (*See* Pet. at 9.) Mejorada made no such admission. He testified on cross-examination that one case had linked the "destiny" of the *avalista* with that of the primary debtor; but Mejorada then explained – as part of the same answer – that this one case was superseded by the later jurisprudence on which he relied in testifying that the *avals* are not contingent. (Tr. 5/06/97, at 61-62.)

Any other perceived misstatements of fact or law in the petition are addressed in the arguments that this brief advances for denying the writ requested by the Xacurs. *See* SUP CT. R. 15.2. As will be shown below, the Xacurs incorrectly contend that their debts are: (1) contingent under Mexican law; and (2) subject to any bona fide dispute under Texas usury law. Finally, the Xacurs utterly fail to articulate any "compelling reasons" for this Court to grant review. SUP. CT. R. 10.

4. *See infra* p. 10.

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES ONLY THE APPLICATION OF SETTLED FEDERAL LAW TO INDIVIDUAL FACTS.

The Xacurs challenge rulings that are nothing more than the routine application of settled federal statutory law to the facts of this case. There is no dispute over the elements required for initiating an involuntary bankruptcy proceeding under 11 U.S.C. § 303 (App. E to Pet. at 36a-40a). Only two of those elements are even at issue here – that is, whether the Xacurs' debts are contingent and whether they are subject to a bona fide dispute.[5] The Xacurs cite no conflicts among federal courts over the meaning of those two elements, nor do they posit any need for this Court to settle any novel interpretative issues. *Cf.* SUP. CT. R. 10 (listing such conflicts and the need for settling important legal issues as examples of reasons warranting this Court's review).

A liability is contingent if "the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability." *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981). Promissory notes in default are not contingent. 2 COLLIER ON BANKRUPTCY § 303.03[2][a][I] (Lawrence P. King, ed., 15th ed. rev. 2000). Whether a claim is subject to a "bona fide dispute" depends

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5. The other requirements of 11 U.S.C. § 303 are not in dispute. *See In re Xacur*, No. H-97-3283 (S.D. Tex. Oct. 22, 1998) (App. C to Pet. at 10a).

on whether there is "an objective basis for either a factual or a legal dispute as to the validity of the debt." *Subway Equip. Leasing Corp. v. Sims* (*In re Sims*), 994 F.2d 210, 221 (5th Cir. 1993) (citations & quotation marks omitted). The Xacurs do not contest those legal propositions. (*See* Pet. at 9, 13.)

II.

THERE IS NO NEED FOR THIS COURT TO REVIEW THE BANKRUPTCY COURT'S FINDINGS, WHICH WERE PROPERLY AFFIRMED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The twin elements at issue in this case turn primarily on the nature of an *aval* under Mexican law and the applicability of Mexican law to a Mexican business transaction. Such issues do not warrant review by this Court. *See* SUP. CT. R. 10.

A. The Debts Are Not Contingent

The Xacurs argue that, under Mexican law, their avals are contingent because the underlying loans are the subject of a suspension-of-payments proceeding in Mexico, the Mexican equivalent to bankruptcy reorganization. (*See* Pet. at 8.) That suspension-of-payments proceeding, however, relates only to the Xacur Companies, not to the individual Xacurs. *See In re Xacur*, 216 B.R. at 195 (App. D to Pet. at 33a). There is ample evidence in the record that *avals* are not contingent under Mexican law – just as in this country a borrower's bankruptcy would not ordinarily affect a guarantor's duty to pay. *See, e.g.*, *Winters v. George Mason Bank*, 94 F.3d 130, 133 (4th Cir. 1996); *United States v.*

Wright, 57 F.3d 561, 562 (7th Cir. 1995); *Chugach Timber Corp. v. Northern Stevedoring & Handling Corp.* (*In re Chugach Forest Prods., Inc.*), 23 F.3d 241, 246 (9th Cir. 1994).

Article 114 of the Mexican Negotiable Instrument Law provides that one who executes an *aval* (*i.e.*, the *avalista*) has an obligation separate from the maker of the original note. (*See* PX-172, at 3 (App. to Resp. at 1a).) "The avalista becomes severally obligated with the person whose signature he has secured, and his obligation is valid even when the secured obligation is null for whatever reason." (*Id.* at 3.) Article 1989 of the Mexican Civil Code further provides that the creditors can look to all or any one of the joint debtors to pay the obligation. (*See* PX 172, at 8 (App. to Resp. at 1a).) "Each one of the creditors or all together may demand from all of the joint debtors (*deudores solidarios*), or from any of them, the total or partial payment of the debt." (*Id.*)

Contrary to the Xacurs' argument, an *avalista*'s independent and several obligation to pay is not altered by Article 116 of the Mexican Negotiable Instrument Law. According to Mejorada, the Banks' expert witness, Article 116 merely refers to such statutory conditions as the need for the passing of the maturity date and the absence of any limitations bar. (*See* Tr. 5/06/97, at 65; App. E to Pet. at 41a.) Further, as noted earlier,[6] the Xacurs distort the meaning and context of Mejorada's testimony about the "destiny" of the primary debtor and the *avalista*. (*See* Pet. at 9.) Mejorada merely admitted that a case had once referred to their common "destiny," adding that the case was superseded by the later jurisprudence on which Mejorada relied in giving his opinion that the *avals* are not contingent. (Tr. 5/06/97, at 61-62.)

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6. *See supra* p. 6.

Likewise, the Xacurs' obligations are unaffected by the other statute cited by the Xacurs – Article 1097 of the Mexican Commercial Code, which allows, but does not require, a Mexican bankruptcy court to "accumulat[e]" all claims into the suspension-of-payments proceeding. (App. E to Pet. at 40a.) Article 1097 does not even apply here, because it did not become effective until after the Xacurs executed their *avals*, as the Banks' expert witness, Mejorada explained. (*See* Tr. 5/06/97, at 17-18, 20; PX 3.)

Further, the Mexican bankruptcy court has recognized that the Banks' claims against the Xacurs on their *avals* are completely separate from the Xacurs Companies' suspension-of-payments proceeding. The Mexican bankruptcy court did so by refusing to hear a suit against Felipe Xacur on his *aval* on the ground that his *aval* is not within the suspension-of-payments proceeding. (*See* PX 228.)

It is, however, true that, in another proceeding filed by one of the Banks (Confia S.A.), another Mexican civil court did order that Confia's claims against the Xacur Companies and the Xacurs be accumulated into the suspension-of-payments proceeding. (*See* XX 36.) Nevertheless, the Banks' expert, Mejorada, testified that this one order of accumulation was erroneous and did not reflect Mexican law. (*See* Tr. 5/07/97, at 97.) The bankruptcy court below was entitled to accept Mejorada's testimony.

The courts below were likewise entitled to follow other federal cases that have found *avals* to be unconditional guarantees. *See A.I. Trade Fin. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1466 (D.C. Cir. 1995); *Fr. Winkler KG v. Stoller*, 839 F.2d 1002, 1009 (3rd Cir. 1988); *Rayman v.*

Peoples Sav. Corp., 735 F. Supp. 842, 850 (N.D. Ill. 1990); *Banco Nacional de Costa Rica v. Bremar Holdings Corp.*, 492 F. Supp. 364, 366 n.1 (S.D.N.Y. 1980). Although the Xacurs argue that any reliance on those cases is misplaced because they do not deal with a Mexican *aval* (*see* Pet. at 11), the conclusion reached in those cases has been confirmed by a more recent case that did discuss a Mexican *aval*. *Summers v. Guss* – a case not cited in the courts below – observed that a Mexican *aval* is in fact "unconditional." *Summers*, 7 F. Supp. 2d at 239 n.3 (*citing Banco Nacional de Costa Rica*, 492 F. Supp. at 366).

B. The Debts Are Not Subject to Dispute

The other issue before this Court – whether the notes are subject to a bona fide dispute – turns initially on the choice of governing law. The only dispute raised by the Xacurs is whether the promissory notes are usurious. According to the Banks' expert witness, Mejorada, the notes are governed by Mexican law and are not usurious in Mexico. (*See* Tr. 5/06/97, at 45.) That testimony is uncontradicted in the record.

The Xacurs appear to admit that Mexican law is controlling. In their petition before this Court, the Xacurs state that "Mexican law controls" the *avals*; and in their opening brief before the Fifth Circuit, the Xacurs similarly admitted that "**[a]ll of the events made the basis of the Xacurs [sic] relations with the [Banks] arise out of the parties' dealings in Mexico.**" (Pet. at 8; Appellants' Br. at 6 (emphasis in original).)

Further support for applying Mexican law is the Fifth Circuit's analogous decision in *Southwest Livestock & Trucking Co. v. Ramon*, 169 F.3d 317 (5th Cir. 1999). In that case, the Fifth Circuit refused to apply Texas usury law to invalidate a Mexican judgment based on a note executed in Mexico and governed by Mexican law. As the court of appeals observed, Texas public policy against usury aims to protect "necessitous" and "naïve" borrowers "within its boundaries" – concerns that were notably absent in that case. *Id.* at 323 (*quoting Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 753 n.13 (5th Cir. 1981)). Such concerns are absent here as well. Texas public policy simply does not apply to business transacted in Mexico by Mexican citizens, who later fled north to Texas, while their Mexican business ventures "went south." Thus, contrary to the Xacurs' argument, the courts below had no public-policy reason to disregard Mexican law. *See* Pet. at 15.

Even if Texas law applied to the Xacurs' transactions in Mexico, at least some of the notes, and the corresponding *avals*, would still be valid. Because certain of the notes in question failed to specify any rate of interest, Texas law – as well as Mexican law – supplies a non-usurious, statutory interest rate. *See In re Xacur*, 216 B.R. at 194 (App. to Pet. at 30a). Those notes, valid both under Texas and Mexican law, were specifically found by the bankruptcy court to be "sufficient" to authorize the Banks' involuntary bankruptcy proceeding. They are "sufficient" because their aggregate amount satisfies the $10,000 amount-in-controversy requirement for an involuntary bankruptcy proceeding. *See* 11 U.S.C. § 303(b)(1) (1994) (App. to Pet. at 36a).

C. The Lower Courts Properly Considered the Xacurs' Arguments

In their petition, the Xacurs chide the lower courts for making cursory determinations. (*See* Pet. at 2, 8, 12-13.) Specifically, the Xacurs complain that the lower courts gave "cursory treatment of . . . fundamental threshold issues" for an involuntary bankruptcy proceeding, "cursorily addressed" those threshold requirements, and reached "conclusions" that were "cursory" as well as "unsubstantiated." (*Id.*) Apparently, the Xacurs believe that this Court should grant review for that reason.

The Xacurs' complaint rings hollow, given that they themselves devoted only six pages of their opening brief before the Fifth Circuit to the threshold issues of contingency and bona fide dispute. Further, the Xacurs' complaint ignores that they received a full evidentiary hearing in the bankruptcy court, as well as an oral argument before the Fifth Circuit, which noted in its opinion that it had "carefully considered this appeal." (App. to Pet. at 2a.) Suffice it to say that the nature of the lower courts' decision making did not "so far depar[t] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." SUP. CT. R. 10(a).

CONCLUSION

This Court should deny the petition for writ of certiorari filed by Jacobo Xacur, Felipe Xacur and Jose Maria Xacur.

Respectfully submitted,

REAGAN WM. SIMPSON
Counsel of Record
JOHN A. BARRETT
ZACK A. CLEMENT
FULBRIGHT & JAWORSKI, L.L.P.
Attorneys for Respondents
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151

APPENDIX

APPENDIX — RELEVANT STATUTES

Article 114 of the Mexican Negotiable Instrument Law

> The avalista becomes severally obligated with the person whose signature he has secured, and his obligation is valid even when the secured obligation is null for whatever reason.

Article 1989 of the Mexican Civil Code

> Each one of the creditors or all together may demand from the joint debtors (*deudores solidarios*), or from any of them, the total or partial payment of the debt. If they claim everything of one of the debtors and he is found insolvent, they may claim it from the others or from any of them. If they should have claimed only part, or should otherwise have consented to the division of the debt, with respect to one or more of the debtors, they may claim everything from the others obligated, deducting the part of the debtor or debtors released from the joint liability.